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IN THE

Supreme Court of the United States

KHALED EL-MASRI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* SENATOR DICK MARTY, CHAIRMAN OF THE LEGAL AFFAIRS & HUMAN RIGHTS COMMITTEE AND RAPPORTEUR OF THE PARLIMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Council of Europe is an international organization of 47 member states in the European region, founded in 1949.[2] The most enduring legacy of the Council of Europe is the European Convention on Human Rights, adopted in 1950, whose implementation is ensured by the European Court of Human Rights.[3]

Amicus curiae Senator Dick Marty is the Chairman of the Legal Affairs & Human Rights Commission and Rapporteur of the Parliamentary Assembly of the Council of Europe ("PACE") on "Secret detentions & illegal transfers of detainees involving Council of Europe member states." In that role, Senator Marty has prepared two reports: *Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States*[4], dated June 12, 2006 (the "2006 PACE Report"); and *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*,[5] dated June 7, 2007 (the "2007 PACE Report") (collectively, the "PACE Reports"). Senator Marty has filed this brief in support of Mr. Khaled El-Masri's submission that there already exists extensive knowledge of the allegedly "secret" U.S. Extraordinary

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[1] The Solicitor General of the United States and the Petitioner have consented to the filing of this *amicus curiae* brief.

[2] For more details consult the Council of Europe's website at www.coe.int.

[3] *See* www.echr.coe.int. (the Court's website).

[4] *Available at* http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf.

[5] *Available at* http://assembly.coe.int/Documents/WorkingDocs/doc07/edoc11302.pdf.

Rendition Program (the "Extraordinary Rendition Program" or "Program").[6]

The PACE Reports are based on information gathered from official government sources, intelligence agencies and agents, and various existing materials, *e.g.*, the analysis of thousands of international flight records obtained from different sources, including international air traffic control authorities.[7] No conclusions in the PACE Reports are based on single statements, and all statements have been confirmed by distinct independent sources.[8] It should be noted that individual sources were only willing to talk to the Rapporteur on the condition of anonymity. This willingness to guarantee PACE contacts strict confidentiality was also endorsed by the Legal Affairs and Human Rights Committee and communicated to Mr. Franco Frattini, Vice-President of the European Commission, so that he could notify the relevant ministers in EU countries.[9] These guarantees created an atmosphere of trust and enhanced the value of the Reports. Where possible, information was cross-checked in the European countries concerned, in the U.S., and through objective documents or data.[10] The PACE

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6 The 2006 PACE Report is referred to in the Joint Appendix at JA200-201, ¶ 20, but is not included in the Joint Appendix. The 2007 PACE Report was released after the filing of the Joint Appendix. We respectfully request that this Court take judicial notice of the PACE Reports, given that they are material to the determination of whether *certiorari* should be granted. *Papasan v. Allain*, 278 U.S. 265, 268 n.1 (1986) (noting that the Court can take notice of items in the public record in considering motion to dismiss); *see also Sec'y of State for Def. v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007) (same).

7 2007 PACE Report at ¶ 12.

8 *Id.*

9 *Id*

10 *Id.*

Reports reflect a consistent concern for objectivity guided by a commitment to the values the Council of Europe has always worked to uphold.[11]

SUMMARY OF ARGUMENT

The PACE investigation of the Extraordinary Rendition Program arose from a concern that violations of human rights were being perpetrated on European soil at the behest of the U.S. government. These investigations have confirmed and provided further details on the Extraordinary Rendition Program, through which the U.S. government has engaged in the illegal abduction, detention, and torture of private individuals (including petitioner Khaled El-Masri), in complete disregard of his due process rights.

The United States was founded on the fundamental principle that the power of the Executive is not limitless. Yet the U.S. government has hidden behind the state secrets doctrine in order to escape judicial accountability for its actions—although virtually nothing concerning the core of Mr. El-Masri's claims remains secret. As set forth below, PACE's investigation has revealed in considerable detail the facts and circumstances surrounding Mr. El-Masri's detention pursuant to the Extraordinary Rendition Program. Indeed, the relative ease with which the mechanics of this case have been revealed demonstrates that the application of the state secrets doctrine here is wholly unwarranted. Moreover, the U.S. has publicly admitted to the existence of the Program, as well as Mr. El-Masri's abduction, further discrediting the applicability of the state secrets doctrine in this case.

But this case is about more than just the application of the state secrets doctrine. The U.S. government should

[11] 2006 PACE Report at ¶ 18.

not be permitted to ignore the international community's concerns regarding the unfettered nature of the Extraordinary Rendition Program. International law exists by virtue of reciprocity and accountability. When a country disregards the law of nations, it relinquishes the moral and legal authority to claim its protections. By ignoring the overwhelming international consensus and arguing that individuals like Mr. El-Masri cannot seek redress through the court system when there are clear abuses under the Extraordinary Rendition Program, the U.S. government has effectively legitimized the use of similar tactics by its enemies abroad—thereby jeopardizing its overseas citizens and soldiers and undermining the credibility of its foreign policy. It follows that the Court should grant Mr. El-Masri's petition and allow him to present his case to the trial court (while at the same time protecting the legitimately secret aspects of the Program).

STATEMENT OF FACTS

Mr. El-Masri, a German citizen, initiated this suit in the District Court for the Eastern District of Virginia to recover damages for injuries he suffered during an illegal abduction and detention that took place as part of the Extraordinary Rendition Program. Mr. El-Masri was held *incommunicado* for over five months but was never charged with any crime. Mr. El-Masri was released several months after his captors became aware that he had been captured solely on the basis of mistaken identity and that he was innocent of any crime or terrorist connection. Some time after his release on or around May 28, 2004, U.S. government officials admitted that it had, in connection with the Extraordinary Rendition Program,

detained Mr. El-Masri. The U.S. government further admitted that it had done so by mistake.[12]

The district court dismissed Mr. El-Masri's claims based on the government's invocation of the "state secrets privilege." *See El-Masri v. United States*, 437 F. Supp. 2d 530 (E.D. Va. 2006). The Fourth Circuit affirmed the district court's dismissal and its finding that the substance of Mr. El-Masri's claim could not be heard without revealing state secrets. *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

Efforts by PACE, news agencies, and foreign governments have brought many of the critical details regarding Mr. El-Masri's illegal abduction and detention into the public domain. Prior to his detention, Mr. El-Masri had been under surveillance by German intelligence operatives, mainly due to his regular visits to an Islamic cultural center in his home town of Neu-Ulm, Germany.[13] Information collected by those German intelligence sources ultimately led to his arrest.[14] PACE fur-

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[12] Former German Foreign Minister Otto Schily testified to a German parliamentary committee that the CIA mistake was acknowledged to him by Daniel Coats, then the U.S. ambassador to Germany. *German Ministers Deny Helping U.S. Kidnap Terror Suspect*, DEUTSCHE WELLE (December 14, 2006) available at http://www.dw-world.de/dw/article/0,2144,2272797,00.html. German Chancellor Angela Merkel also publicly stated that American officials had admitted to her that Mr. El Masri's abduction had been a mistake. State Department Press Release, Press Availability with German Chancellor Angela Merkel, December 6, 2005, *available at* http://www.state.gov/secretary/rm/2005/57672.htm.

[13] Stefan Nicola, *Analysis: Germans Want to Question Tenet*, UPI (September 28, 2006).

[14] *Id.* The German external intelligence service, the BND, has also said that it knew about the American seizure and detention of Mr. El-Masri, as well as his rendition to and subsequent torture in Afghanistan. Stephen Grey, Elisabetta Povoledo, *Intelligence Officials*

ther learned that the CIA asked the Macedonian authorities to secure and detain Mr. El-Masri until he could be handed over to the CIA.[15]

The public record confirms the details regarding Mr. El-Masri's stay in Macedonia. In his affidavit, Mr. El-Masri testified that after he was questioned at the Macedonian border, he was taken to a hotel later identified, with the help of journalists of the German public TV station "ZDF" investigating in Skopje, as the Skopski Merak.[16] The Macedonian Ministry of the Interior has confirmed that Mr. El-Masri stayed at the Skopski Merak for 23 nights, checking out on January 23, 2004.[17]

In addition, the PACE investigation showed that the techniques used to interrogate Mr. El-Masri match those regularly employed by the CIA to interrogate terrorist suspects.[18] Mr. El-Masri's allegations—that his captors put a bag over his head, chained his hands to a belt, fastened headphones to his ears, clipped his nose, and fitted him with a diaper—are consistent with techniques used against other detainees of the Extraordinary Rendition Program.[19]

Arrested in Kidnapping, INT'L HERALD TRIBUNE (July 7, 2006). *See also* 2006 PACE Report at ¶ 116.

[15] *Id.*

[16] El-Masri Aff. at ¶ 14.

[17] 2006 PACE Report at ¶ 109. *See also* Stefan Nicola, *New Evidence in the El-Masri Case*, UPI (June 26, 2006); *German Government Insists It Learnt of CIA Detention Case too Late*, AGENCE FRANCE PRESSE (June 23, 2006).

[18] 2006 PACE Report at ¶¶ 79 to 86 and 95.

[19] El Masri Aff. at § 30; Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASHINGTON POST (December 4, 2005). Fellow detainees have reported similar experiences. *See, e.g.*, Craig Smith, *Algerian Tells of Dark Odyssey in U.S. Hands*, N.Y. TIMES (July 7, 2006).

Likewise, the details of Mr. El Masri's transport are well known. Mr. El-Masri was spirited to the airport at Skopje where he was boarded onto a waiting aircraft.[20] The PACE investigation has revealed that the aircraft registered with the ground staff and paid its route charge fees in an unusual manner; no passengers disembarked to enter the terminal building and cross into Macedonian territory.[21] The plane never taxied closer than one kilometer to the terminal.[22] A team of armed Macedonian security police formed a lookout nearby, under strict instructions to face away from the aircraft.[23]

Foreign judicial authorities and reporters have even determined the names of the rendition team members and the pilots tasked to fly the planes.[24] A Spanish reporter has compiled the names of people said to be involved in Mr. El Masri's abduction from sources in the Spanish *Guardia Civil*.[25] Spanish authorities, aware that the CIA frequently uses the island of Majorca as a logistics center for its flights, confirmed through hotel logs that the members of the rendition team were on the island.[26]

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[20] El Masri Aff. § 34, Exhibit A. Newsweek has also confirmed that flight plans confirm that a Gulfstream V and a Boeing 737 were operated by the CIA on flight paths consistent with Mr. El-Masri's story. Michael Hirsh, Mark Hosenball, John Barry, *Aboard Air CIA*, NEWSWEEK NATIONAL NEWS (February 28, 2005); *see also* 2006 PACE Report at ¶ 124.

[21] 2006 PACE Report at ¶ 124.

[22] *Id.*

[23] *Id.*

[24] John Goetz, Marcel Rosenbach, Holger Stark, *German CIA Arrest Warrants Strain Ties with USA*, BBC WORLDWIDE MONITORING (June 27, 2007).

[25] Mark Landler, *German Court Confronts U.S. on Abduction*, N.Y. TIMES (February 1, 2007) at A1.

[26] *Id.*; 2006 PACE Report at 125.

Thus, despite the professed secrecy of the Extraordinary Rendition Program, it is apparent that the identities of many of its agents can be, and have been, easily determined.

Mr. El-Masri was held at a base in Kabul, Afghanistan, until Secretary of State Condoleezza Rice ordered his release after learning that Mr. El-Masri had been detained on the basis of mistaken identity.[27] A few weeks later, on May 28, 2004, Mr. El-Masri was flown out of Kabul on a CIA-chartered Gulfstream aircraft to a military airbase in Albania called Bezat-Kuçova Aerodrome.[28]

The fact of Mr. El-Masri's illegal detention as well as his torture and interrogation has been corroborated by authoritative independent sources, including comprehensive investigations conducted by foreign legal and political authorities. In the three years following his arrest, Mr. El-Masri's case has been investigated and reported upon extensively, including by the Untersuchungsausschuss (Committee of Inquiry) of the German Bundestag and German prosecutors.[29] The PACE Rapporteur has confirmed that it is undisputed among the members of the Bundestag Committee of Inquiry that Mr. El-Masri's report is true.[30] The foregoing investigations have produced considerable insight into the organization and methodology of the CIA's "secret" Extraordinary Rendition Program. In addition, these investigations have created renewed public interest

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[27] NBC Investigative Unit, CIA Accused of Detaining Innocent Man—If the Agency Knew He Was the Wrong Man, Why Was He Held? (April 14, 2005) *available at* http://www.msnbc.msn.com/id/7591918/; *see also* 2007 PACE Report at § 276 n. 219.

[28] 2007 PACE Report at § 279. The aircraft was issued permission to enter European airspace for "flight movements for the needs of the CIA, USA." *Id.*

[29] *Id.* at § 278.

[30] *Id.* at § 289.

in the program. In 2007, German prosecutors issued international arrest warrants for thirteen suspected CIA agents for their activities in relation to Mr. El-Masri's disappearance.[31] It is extremely likely that as these investigations progress, more information regarding Mr. El-Masri's rendition specifically, and the Extraordinary Rendition Program generally, will be made publicly available.

Despite the U.S. government's assertion that Mr. El-Masri's claim implicates the state secrets doctrine, the basic premise of this case—that Mr. El-Masri was improperly detained pursuant to the Extraordinary Rendition Program—is openly acknowledged by the U.S. government. President Bush has admitted that the CIA operates the Extraordinary Rendition Program,[32] and CIA Director George Tenet has made public official statements about it.[33] Even the U.S. Department of Justice has

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[31] *Id.* at § 286.

[32] In a speech on September 6, 2006, President Bush stated, "[A] small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency." President Discusses Creation of Military Commissions to Try Suspected Terrorists, September 6, 2006 at ¶ 12 *available at* http://www.whitehouse.gov/news/releases/2006/09/print/20060906-3.html. The White House Press Secretary has acknowledged that "Rendition is not something that began with this administration and it's certainly going to be practiced, I'm sure, in the future." Press Gaggle by Tony Snow, Feb. 23, 2007, *available at* http://www.whitehouse.gov/news/releases/2006/06/20060607-2.html.

[33] Written Statement for the Record of the Director of Central Intelligence Before the National Commission on Terrorist Attacks Upon the United States, Oct. 17, 2002; "Counterterrorism Policy: Hearing Before the National Commission on Terrorist Attacks Upon the United States," Statement by George Tenet, former Director of Central Intelligence, March 24, 2004, available at http://www.9-11commission.gov/archive/hearing8/9-11Commission_Hearing_2004-03-24.htm.

internally circulated a memorandum entitled "The President's Power as commander-in-chief, to Transfer Captured Terrorists to the Control and Custody of Foreign Nations."[34] Secretary of State Condoleezza Rice has also made various public statements, both about the Extraordinary Rendition Program generally[35] and about Mr. El-Masri specifically.[36]

ARGUMENT

Given that the Extraordinary Rendition Program as a whole, and so many of the details regarding Mr. El-Masri's situation in particular, are in the public domain, it would be contrary to the purpose of the state secrets doctrine and fundamental legal principles to allow the U.S. government to shield its clearly wrongful acts on the basis of that doctrine. This reflexive invocation of the state secrets doctrine and the lower courts' accep-

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[34] *See* Nat Hentoff, *Sweet Land of Liberty*, THE WASHINGTON TIMES, Feb. 19, 2007.

[35] Secretary Rice said in 2005 that the rendition program was "a vital tool in combating transnational terrorism" to be employed when, "for some reason, the local government cannot detain or prosecute a suspect, and traditional extradition is not a good option." In those instances, she said, "the United States and other countries have used 'renditions' to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice." State Department Press Release, Remarks Upon Her Departure for Europe, December 5, 2005, *available at* http://www.state.gov/secretary/rm/2005/57602.htm.

[36] State Department Press Release, Press Availability With German Chancellor Angela Merkel, December 6, 2005, *available at* http://www.state.gov/secretary/rm/2005/57672.htm (German Chancellor Angela Merkel expressed her satisfaction that "the American Government, the American Administration, has admitted that [Mr. El-Masri] had been erroneously taken"); Glenn Kessler, *Rice to Admit German's Abduction Was an Error*, WASHINGTON POST, A18, December 7, 2005; *see also* 2007 PACE Report at ¶ 276 n.219.

tance of it also threaten key U.S. foreign policy objectives, including national security and relationships with important allies.

I. THE CIRCUMSTANCES SURROUNDING MR. EL-MASRI'S CASE HAVE BEEN REVEALED NOT ONLY BY THE PARLIAMENTARY ASSEMBLY, BUT ALSO AS A RESULT OF OTHER MULTI-NATIONAL INVESTIGATIVE EFFORTS PLACING THE RELEVANT FACTS SQUARELY IN THE PUBLIC DOMAIN

In addition to the PACE inquiry, and that of the Secretary General of the Council of Europe[37] a number of inter-governmental agencies, states, and non-governmental organizations ("NGOs") have conducted investigations into the Extraordinary Rendition Program. A review of these investigations provides substantial evidence of both the operation of the Program and the key details of this case.

For example, the European Parliament and its Temporary Committee of Inquiry looked into allegations

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[37] *See, e.g.*, Terry Davis, Proposal of the Secretary General of the Council of Europe, Follow-up to the Secretary General's Reports Under Article 52 ECHR on the Question of Secret Detentions and Transport of Detainees Suspected of Terrorist Acts, Notably by or at the Instigation of Foreign Agencies (SG/Inf (2006) 5 and SG/INF (2006) 13), Doc. No. SG (2006) 01, *available at* http://www.coe.int/t/dc/press/source/20060907_DocSG_en.doc. *See also* Opinion of the Council of Europe's European Commission for Democracy through law (Venice Commission), Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transfer of Prisoners, Doc. No. CDL-AD (2006) 009, Opinion No. 363/2005 (March 17, 2006) *available at* http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp. Other relevant documents can be found on the Council of Europe's website at www.coe.int.

that the CIA had been operating its Extraordinary Rendition Program within the European Union.[38] The final report adopted by the European Parliament, issued in February 2007, mentions up to 21 well-documented cases in which victims were transferred through a European country or were residents of a European State at the time of their kidnapping,[39] and forcefully condemned this practice.[40] Numerous other investigations into Mr. El-Masri's allegations and into the Extraordinary Rendition Program generally have been undertaken by many entities, including approximately 30 countries,[41] the United Nations[42] and various

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[38] *See* European Parliament Decision Setting up a Temporary Committee on the Presumed Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, Eur. Parl. Doc. (B6-0051/2006), (Feb. 21, 2006), *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+B6-2006-0051+0+DOC+PDF+V0//EN.

[39] *See* Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners (2006/2200(INI)) Eur. Parl. Doc. AG-0020/2007 ¶42 (Jan. 30, 2007), *available at* http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf.

[40] *See* European Parliament Resolution on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners (2006/2200(INI)), Eur. Parl. Doc. P6_TA-PROV(2007)0032, ¶39 (Feb. 14, 2007), *available at* http://www.europarl.europa.eu/comparl/tempcom/tdip/final_ep_resolution_en.pdf.

[41] *See* Council of Europe, Supplementary Report by the Secretary General on the Use of the Powers under Article 52 of the European Convention of Human Rights: Information Documents (June 14, 2006), http://www.coe.int/T/E/Com/Files/Events/2006-cia/.

[42] *See, e.g.*, Preliminary Findings on Visit to United States by Special Rapporteur on Human Rights and Counter-Terrorism, May 29, 2007, http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/50C0462CBA023716C12572EA00489271?OpenDocument ("[T]he Special Rapporteur concludes that his visit supports the sus-

NGOs.[43] The existence and substance of these investigations warrant the special attention of this Court.

That the perspectives of other States should be considered by every country was recognized by America's founders. Federalist Paper No. 63 notes:

> An attention to the judgment of other nations is important to every Government for two reasons: The one is, that, independently of the merits of any particular plan or measure, it is desirable, on various accounts, that it should appear to other nations as the offspring of a wise and honorable policy. The second is, that *in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed.*

The Federalist No. 63 (emphasis added).

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picion that the CIA has been involved in the extraordinary rendition of terrorism suspects and possibly other persons. This conclusion is corroborated by the recent findings of the Human Rights Committee and Committee Against Torture in the cases of *Agiza v Sweden* and *Alzery v Sweden* in which Sweden was found to violate its human rights treaty obligations by handing over Mr. Agiza and Mr. Alzery to CIA agents in the course of their rendition to Egypt."); U.N. Human Rights Committee and Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture, May 18, 2006, http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf (directly charging to "cease the rendition of suspects, in particular by its intelligence agencies, to States where they face a real risk of torture").

[43] *See, e.g.*, Amnesty International, *Below the Radar: Secret Flights to Torture and 'Disappearance,'* April 5, 2006, http://web.amnesty.org/library/Index/ENGAMR510512006; Human Rights Watch, *Ghost Prisoner: Two Years in Secret CIA Detention*, February 2007, http://hrw.org/reports/2007/us0207/index.htm.

II. OTHER DEMOCRATIC TRADITIONS PROVIDE A RIGHT TO A FORUM FOR VIOLATIONS OF INTERNATIONAL LAW WITHOUT COMPROMISING NATIONAL SECURITY

Certain fundamental legal principles, including specific fair trial rights, have become part of international law and are enshrined in many documents, including the European Convention on Human Rights, whose court requires contracting states parties to provide a forum for the adjudication of fundamental human rights violations.[44]

The European Court of Human Rights has recognized the need for states to prevent the disclosure of certain information for national security reasons. Nevertheless, the European Court still requires the availability of some type of effective (judicial) remedy in cases involving national security and terrorism.

There is a well-established case-law of the European Court of Human Rights in this respect.[45]

In *Chahal v. United Kingdom*, a national security case involving the adequacy of the legal review of a deportation order, the court observed: "[T]he use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control

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[44] *See also*, PACE Report The United States of America and International Law, dated 8 February 2007, *available at* http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc07/edoc11181.htm.

[45] For an overview of the Court's case-law see Introductory Memorandum of Rapporteur Grebennikov, entitled "*Respect for Human Rights in the Fight Against Terrorism,*" document AS/Jur (2006), *available at* http://www.coe.int/t/e/legal_affairs/legal_cooperation/fight_against_terrorism/3_codexter/working_documents/2007/CODEXTER%20(2007)%2014%20E%20PACE.pdf.

by the domestic courts whenever they choose to assert that national security and terrorism are involved."[46]

Failure to grant Mr. El-Masri a judicial forum isolates U.S. governmental conduct from review, and reveals the failure of the United States to abide by fundamental human rights norms that exist in virtually all European states.[47]

III. THE DENIAL OF REVIEW TO MR. EL-MASRI WILL UNDERMINE U.S. INTERNATIONAL STANDING AND THE RULE OF LAW

As this Court has held, "international law is founded upon mutuality and reciprocity." *Hilton v. Guyot*, 159 U.S. 113, 228 (1895). If the U.S. expects its citizens' human rights to be honored by foreign governments, it must treat citizens of other countries with the same level of respect for their rights. This is consistent with the international law principle of reciprocity, which requires that favors, benefits, or penalties that are granted by one

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[46] *Chahal v. United Kingdom*, 23 Eur. H.R. Rep. 413 (1997), ¶ 131. Also, in *Tinnelly & Sons Ltd. et al. v. United Kingdom*, a case involving the awarding of work contracts requiring access to vital power supplies and public buildings in the main centers of Northern Ireland, the European Ct. of Human Rights ultimately found that the applicants' fair trial rights were disproportionately restricted. The Court noted "that in other contexts it has been found possible to modify judicial procedures in such a way as to safeguard national security concerns . . . and yet accord the individual a substantial degree of procedural justice." *Tinnelly & Sons Ltd. and Others and McElduff & Others v. United Kingdom*, 27 Eur. H.R. Rep. 249 (1999), ¶ 78. *See also Fox, Campbell and Hartley v. United Kingdom*, 13 Eur. H.R. Rep. 157 (1991), and *Murray v. United Kingdom*, 19 Eur. H.R. Rep. 193 (1995).

[47] *See* PACE Resolution 1562 (2007) § 10 and PACE Recommendation 1801 (2007) § 3.

state to the citizens or legal entities of another state should be returned in kind.[48]

The U.S. cannot expect other countries to comply with and enforce international law within their spheres of influence if it does not require the same of itself. The U.S. advocates for the broad enforcement of fundamental rights for the benefit of its allies and its own citizens abroad. *See, e.g., Case Concerning U.S. Diplomatic and Consular Staff in Tehran, (United States v. Iran)* 1980 I.C.J. 3 at ¶¶ 23, 69 (May 24, 1980) (U.S. government sought and won reparations from the Islamic Republic of Iran for injuries sustained by kidnapped U.S. diplomatic personnel). Consistent with the principle of reciprocity, other countries expect the U.S. to enforce human rights within the realm of its authority. For example, the English Court of Appeal declined to compel the British Secretary of State to make representations to the U.S. concerning Guantanamo Bay in *The Queen on the Application of Abbasi & Anor v. Sec'y of State for Foreign and Commonwealth Affairs*, 2002 WL 31452052 [2002] EWCA Civ. 1598 (A.C.) (appeal taken from Q.B.D.), partly based on that court's expectation that the U.S. would ultimately comply with international law:

> What appears to us to be objectionable is that Mr. Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal. It is important to record that the position may change when the appellate courts in the United States consider the matter. . . . *As is clear from our*

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[48] Robert Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1 (1986).

> *Judgment, we believe that the United States Courts have the same respect for human rights as our own.*

Id. at ¶¶ 66, 107 (emphasis added).

To the contrary, the U.S. government's actions have created a legal precedent for the arbitrary abduction, illegal detention, and torture of U.S. military and civilian personnel abroad. If an American civilian were to be subjected to extraordinary rendition by a foreign state, the U.S. government could not credibly protest. It would be equally futile for the U.S. to attempt to rally its allies, since the U.S. has reportedly denied the same rights to citizens from all over the world, including Germany, Mr. El-Masri's home country.

Foreign governments are already citing to the American example to justify abuses of international law. Malaysia's law minister said Malaysia's practice of detaining militants without trial was "just like [ ] Guantanamo Bay," emphasizing that he used "the equation with Guantanamo just to make it graphic [ ] that this is not simply a Malaysian style of doing things."[49] The Extraordinary Rendition Program provides similar precedent for foreign states.

The Extraordinary Rendition Program has also strained U.S. relations with its allies. The German authorities opened an official investigation into Mr. El-Masri's case in June 2004. The Munich state prosecutor Martin Hofmann is convinced that "[t]here's just no indication that [Mr. El Masri] is [lying]."[50] A German

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[49] Sean Yoong, *Malaysia Slams Criticism of Security Law Allowing Detention Without Trial*, ASSOCIATED PRESS, Sept. 17, 2003 (available from Westlaw at 9/9/03 APWIRES 09:34:00).

[50] Georg Mascolo and Holger Stark, *The U.S. Stands Accused of Kidnapping*, Spiegel Online, February 14, 2005, http://www.spiegel.de/international/spiegel/0,1518,341636,00.html.

parliamentary committee of inquiry is also looking into Mr. El-Masri's allegations. Thomas Oppermann, chairman of the committee, has said that the "core of the story" was "probably true" but that some facts remained ambiguous because certain countries, including the U.S. and Macedonia, have prevented access to evidence.[51] In January 2007, the Munich prosecutor issued international arrest warrants for thirteen CIA agents it believes were involved in Mr. El-Masri's abduction and detention.[52] For ten of the agents, the district attorney's office in Munich filed international warrants with Interpol, and German officials have stated their intent to request extradition of these agents.[53]

A similar strain has been placed on Italian-U.S. relations with respect to the 2003 abduction and extraordinary rendition of the alleged terrorism suspect Osama

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[51] Lots of expenses, few results, Interview with Thomas Oppermann, Chairman of the investigating committee, German Parliament, http://www.bundestag.de/dasparlament/2006/28-29/kulissen/003.html.

[52] *Germany Issues Arrest Warrants for 13 CIA Agents in El-Masri Case*, Spiegel Online, January 31, 2007, http://www.spiegel.de/international/0,1518,463385,00.html.

[53] *See, e.g.*, John Goetz, Marcel Rosenbach and Holger Stark, *CIA Arrest Warrants Strain US-German Ties, Spiegel Online*, June 27, 2007, http://www.spiegel.de/international/germany/0,1518,490514,00.html., Michael Isikoff and Mark Hosenball, *Hunting the Hunters*, NEWSWEEK, March 29, 2007, http://www.msnbc.msn.com/id/17859632/site/newsweek ("The U.S. has on multiple occasions made clear that it will consider a request for extradition as an unfriendly act that would burden bilateral relations,' said a European official who requested anonymity owing to the sensitivity of the subject—a view confirmed by a senior American official."). Following Spiegel Online's June 27, 2007, report, there has been no information available in the public domain regarding whether or when the German government plans to petition for extradition of any of the agents for whom warrants have been issued.

Moustafa Hassan Nasr. Mr. Nasr was seized in Milan, allegedly by the CIA with the help of the Military and Intelligence and Security Service (SISMI). He was then allegedly sent to Egypt and turned over to Egypt's State Security Intelligence (SSI) where he was purportedly tortured and released in February 2007. Later that month, indictments were issued for 26 CIA agents and 5 SISMI officials for their alleged roles in Mr. Nasr's abduction. The U.S. refused to extradite the agents; they will be tried *in absentia* if the trial goes forward.[54]

In the case of Maher Arar, the Canadian abducted in New York and tortured in a Syrian prison, Canada allowed a special commission of inquiry access to all the necessary information, including certain documents that could not be made public.[55] The commissioner, a judge, and not the government became the arbiter of what was supposedly a "state secret." Mr. Arar ultimately received compensation and a formal apology from the Canadian Prime Minister.

On December 6, 2005, in response to a press inquiry about the Mr. El-Masri's allegations, Secretary Rice said: "Any policy will sometimes have mistakes and it is our *promise* to our partners that should that be the case, that we will do everything that we can to rectify those

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[54] Italian Judge Oscar Magi has currently suspended the trial until October 24, 2007 until the Constitutional Court of Italy rules on the Italian government's petition to dismiss all charges on the grounds of state secrecy. *See* Elisabetta Povoledo, *Kidnapping Trial of Operatives from the C.I.A. Delayed in Italy*, N.Y. Times (June 19, 2007). However, unlike the U.S., even if the Court decides to dismiss all the charges, they will still have reviewed the issue.

[55] *See* the Report of the Events Relating to Maher Arar—Analysis and Recommendations ADDENDUM, published in August 2007, *available at* http://www.ararcommission.ca; *see also* the Report of the Events Relating to Maher Arar—Analysis and Recommendations, published in July 2006, *available at* http://www.ararcommission.ca.

mistakes. I believe that this will be handled in the proper courts here in Germany and if necessary *in American courts as well.*"[56] Contrary to Secretary Rice's statement, the claims by Mr. El-Masri in the U.S. court system have been shunted aside and dismissed *before* they were heard—a stark companion to the treatment of Mr. Nasr's claims in Italy and Mr. Arar's claims in Canada.

The failure of the judiciary to allow Mr. El-Masri to even attempt to prove his allegations sends an inappropriate message that the rule of law only needs to be respected when it suits the interests of the U.S. government.

CONCLUSION

For the reasons stated above, Senator Marty respectfully requests that this Court grant a writ of *certiorari* to Mr. El-Masri.

Respectfully submitted,

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[56] Press Release, Press Availability With German Chancellor Angela Merkel, (December 6, 2005), http://www.state.gov/secretary/rm/2005/57672.htm (emphasis added).

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